No. 1090

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Supreme Court of the United States

OCTOBER TERM—1944.

ALFONSO DIUGUID,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on February 27th, 1945 affirming a judgment of conviction of the District Court of the United States for the Eastern District of New York.

STATEMENT OF MATTERS INVOLVED.

The petitioner was indicted on four counts charging the unlawful possession of an unregistered still, the unlawful manufacture of alcohol, the conducting of business of distiller in violation of law and the unlawful possession of distilled spirits in containers lacking Internal Revenue stamps.

Prior to the trial a motion was made to suppress certain evidence—the still, alcohol, mash, etc.—seized in the petitioner's apartment, on the ground that the search of the petitioner's apartment and the seizure of the aforementioned articles were made by federal agents without a warrant of search and seizure or arrest and, therefore, such search and seizure violated the constitutional rights of the petitioner. The motion was denied, but the petitioner was given the right to renew upon the trial (fol. 5).

Upon the trial of the indictment, the petitioner waived his right to a trial by jury. At the outset counsel for the petitioner indicated the nature of the defense to be that the search and seizure without a warrant violated the petitioner's constitutional rights and consequently the evidence must be suppressed.

It was conceded that the petitioner resided in an apartment consisting of four rooms located on the top floor of a three-story apartment building located at 2016 Dean Street, Brooklyn, New York (fols. 26-28).

The government's case was based upon the testimony of two witnesses, to wit, a police officer of the City of New York and a federal agent of the Alcohol Unit Division of the Federal Government.

The police officer testified that after receiving information that a still was in operation, he went to the apartment of the petitioner (fol. 30). Unable to gain admittance, the police officer, who had no warrant either for the arrest of the petitioner or for the search and seizure of his apartment, forcibly broke into the petitioner's apartment (fols. 31-32). The police officer neither arrested the petitioner, nor seized the still, mash, and other articles (fol. 45).

Thereafter the police officer telephoned a federal agent at his home and, later, federal agents without a warrant for either the arrest of the petitioner or search and seizure, walked into the petitioner's apartment through the doorway, which had been forced by the police officer (fols. 39, 45).

The police officer had not seized nor had he removed the still, alcohol, mash, etc. Consequently, he did not turn said

articles over to the federal agents. The federal agents seized the still and other articles and then made the arrest (fols. 52-53).

The court below in affirming the conviction held that the federal agents did not act in concert with the police officer and concluded, therefore, that "when federal officers are not guilty of misconduct, evidence will not be suppressed merely because it was unlawfully seized by the police before the federal officers took possession of it". But in holding that the federal agents were not guilty of misconduct, the courts overlooked or ignored the central fact of misconduct and that is that the federal agents entered the apartment of the petitioner without his consent, without a warrant of search and seizure or for his arrest, and after it had been broken into by the police officer. The forcible and illegal entry by the police officer did not confer upon the federal agents the right to enter the apartment without the petitioner's consent. An illegal entry cannot make legal a subsequent unauthorized entry.

QUESTIONS PRESENTED.

1. Did the seizure of the still, alcohol, mash, etc. by the federal agents constitute an illegal seizure where it appears that such federal agents, without a warrant of search and seizure or arrest, entered the apartment of the petitioner through its doorway which had been previously forced by a city police officer who had no warrant of search and seizure or arrest and who had not made a seizure or arrest?

2. Does the forcible entry into a home by a city police officer without a warrant of search and seizure or arrest render it unnecessary for a federal agent to obtain a warrant of search and seizure?

3. Does the violation of a State Penal law by federal agents in making a search and seizure render evidence so illegally seized inadmissible in the federal courts?

4. Was it error for the court to admit into evidence the evidence which had been seized by the federal agents?

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the court below is in apparent conflict with the decisions of other Circuit Courts of Appeals on similar matters.

Gilbert v. *United States*, 144 Fed. 2nd 568, C. C. A. 10th Circuit;

Sutherland v. *United States*, 92 Fed. 2nd 305, C. C. A. 4th Circuit;

Miller v. *United States*, 50 Fed. 2nd 505, C. C. A. 3rd Circuit.

2. The decision of the court below holding admissible the evidence obtained by the federal agents in an unlawful search and seizure, is a decision upon a federal question in apparent conflict with the applicable decisions of this court.

3. The decision of the court below holding such evidence admissible is a decision upon an important question which has not been definitely decided, but should be settled by this court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

Dated: New York, N. Y., March 24th, 1945.

HAROLD SHAPERO,
Counsel for Petitioner.